U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

PAULINE M. EWALD,

COMPLAINANT,

v.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF WASTE MANAGEMENT,

RESPONDENT.

ARB CASE NO. 02-027

ALJ CASE NO. 89-SDW-0001

DATE: December 19, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard E. Condit, Esq., ***Washington, D.C.***

For the Respondent:
John R. Butcher, Esq., Senior Assistant Attorney General, ***Richmond, VA***

FINAL DECISION AND ORDER

Pauline Ewald filed a complaint alleging that Virginia's Department of Waste Management fired and blacklisted her because she engaged in activity protected under the whistleblower protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610 (West 1995) (CERCLA), the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6971 (West 2003) (RCRA), the Clean Water Act, 33 U.S.C.A. § 1367 (West 2001) (CWA), and the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) (West 2003) (SDWA), as implemented by the regulations at 29 C.F.R. Part 24 (2002).[1]

[1] These statutes prohibit employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as

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A United States Department of Labor Administrative Law Judge (ALJ) issued a [Recommended] Decision and Order (R. D. & O.) granting Virginia's motion to dismiss Ewald's complaint on Eleventh Amendment state sovereign immunity grounds.[2] The ALJ also denied Ewald's motion to amend her complaint to add various respondents. Ewald timely appealed to the Administrative Review Board (ARB or Board). We affirm the dismissal of Ewald's complaint and the denial of her motion to amend.

BACKGROUND[3]

Ewald began work in 1985 as the Superfund program director for Virginia's Department of Waste Management.[4] She was responsible for site investigation, fiscal management of grant funds from the United States Environmental Protection Agency (EPA), environmental testing, and preliminary assessment and ranking of hazardous waste sites in Virginia.

In September 1986, Ewald received an excellent performance rating. But in August 1987, Dr. K. C. Das, Ewald's supervisor, gave Ewald a performance rating just above minimally satisfactory. Shortly thereafter, Ewald met with EPA officials and alleged that Das had misappropriated grant funds. She also claimed that Das had failed to report toxic discharges from state-owned and operated waste facilities and had not enforced federal regulations.

During late 1987 and early 1988, Ewald continued to complain about Superfund mismanagement. She received several written notices about her performance and attendance. On July 22, 1988, Cynthia Bailey, Director of Virginia's Department of Waste Management and Ewald's second-level supervisor, suspended Ewald for a week

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initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns. *See* 29 C.F.R. § 24.2.

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S CONST. amend. XI.

[3] Our summary of the facts is generally based on Ewald's April 8, 1991 and January 11, 2001 affidavits, the exhibits attached to Commonwealth's Response to Complainant's Motion for Orders Compelling Discovery and for Sanctions, Complainant's Motion for Enlargement of Time to File a Supplemental Brief, and Complainant's Memorandum in Opposition to the Respondent's Motion for Summary Judgment.

[4] "Superfund" is the colloquial name of the CERCLA program which, through program assistance and funding grants, helps the states to identify and clean up hazardous and toxic waste disposal sites.

for mishandling the Cheatham Annex waste site cleanup. Ewald returned to work, but on August 29, 1988, Das fired her for poor performance.

Ewald filed a whistleblower complaint with the Department of Labor's Wage and Hour Division (W & H). She alleged that her employment had been terminated and she had been blacklisted because of her complaints that the Waste Management Department mishandled the severely contaminated site at Cheatham Annex, misappropriated funds from the EPA, mismanaged Superfund grants, and failed to enforce federal standards against polluters responsible for hazardous waste sites.

On January 12, 1989, W & H determined that Ewald's complaint had no merit. Ewald then requested a hearing before an ALJ pursuant to 29 C.F.R. § 24.4(d)(2). After the parties engaged in protracted discovery and a series of motions, cross motions, and appeals that are not relevant here,[5] Virginia moved for dismissal on sovereign immunity grounds in November 2000. Ewald responded to Virginia's motion and, in turn, moved to amend her complaint to add other parties as respondents. The ALJ heard the motions on March 20, 2001. However, because the sovereign immunity issue "was newly raised by the Commonwealth and not the subject of previous discovery," the ALJ, before ruling on the motions, granted Ewald additional discovery on the sovereign immunity issue. Thereafter, with discovery complete and the parties having filed supplemental briefs, the ALJ issued his recommended decision on December 5, 2001. He granted Virginia's motion to dismiss[6] and denied Ewald's motion to add respondents. Ewald appealed.[7]

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[5] Two remand orders explain a convoluted procedural history that resulted in a five-year hiatus while the case was on appeal to the ARB. *See Ewald v. Commonwealth of Virginia,* 89-SDW-1 (Sec'y April 20, 1995) (Dec. and Remand Ord.); *Ewald v. Commonwealth of Virginia,* ARB No. 00-077, ALJ No. 89-SDW-1, (ARB Aug. 21, 2000) (Remand Ord.).

[6] We treat Virginia's "Motion to Dismiss" as a "Motion for Summary Decision" pursuant to 29 C.F.R. § 18.40. *See Erickson v. United States Envtl. Prot. Agency,* ARB No. 99-095, ALJ No. 1999-CAA-2, slip op. at 3 n.3 (ARB July 31, 2001).

[7] On January 28, 2002, the Assistant Secretary for OSHA informed the ARB that he intended to file an amicus brief and asked the ARB to stay briefing until the United States Supreme Court decided *South Carolina State Ports Auth. v. Federal Mar. Comm'n,* 243 F.3d 165 (4th Cir. 2001), *petition for cert. granted,* 534 U.S. 971 (2001). The Board issued an "Order Granting Suggestion to Stay Briefing" on January 31, 2002. On May 28, 2002, the Supreme Court decided that sovereign immunity under the Eleventh Amendment barred the FMC from adjudicating a complaint filed by a private party against a non-consenting state. *Federal Mar. Comm'n v. South Carolina Ports Auth.,* 535 U.S. 743 (2002). As a result of that decision the Board requested the parties and the Assistant Secretary to inform the Board how they wished to proceed. The Assistant Secretary replied by an October 31, 2002 written

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JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 (2002) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including, inter alia, 42 U.S.C.A. § 9610, 42 U.S.C.A. § 6971, 42 U.S.C.A. § 1367, and 42 U.S.C.A. § 300j-9(i), the whistleblower protection provisions of the CERCLA, RCRA, CWA, and SDWA, respectively).

The Board reviews an ALJ's recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003). Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999).

Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact and the proponent is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). *See Webb v. Carolina Power & Light Co.,* 1993-ERA-42, slip op. at 5-6 (Sec'y July 4, 1995).

ISSUES TO BE DECIDED

I. Whether state sovereign immunity bars Ewald's complaint against Virginia.

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statement that *South Carolina Ports* required the Board to dismiss Ewald's complaint unless she could prevail on her waiver or amended complaint arguments. The Assistant Secretary informed the Board that he "offers no view" on the merits of Ewald's waiver and amendment arguments. On April 30, 2003, the Board ordered Ewald to show cause, no later than May 20, 2003, why the Board should not dismiss her appeal in light of the Court's *South Carolina Ports* decision.

II. Whether Congress abrogated Virginia's immunity from whistleblower prosecution in the Department of Labor, and whether Virginia waived its immunity.

III. Whether the ALJ erred in denying Ewald's motion to add respondents.

DISCUSSION

I. State sovereign immunity bars Ewald's complaint against Virginia.

States enjoy sovereign immunity from prosecution in federal courts under the Eleventh Amendment as well as the Constitution's structure, history, and the general body of Supreme Court case law. *Alden v. Maine*, 527 U.S. 706, 713 (1999).[8] However, immunity from suit is not absolute. Congress may authorize an individual's suit against a state when exercising its power to enforce the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Or, a state may waive its immunity by consenting to suit. *Clark v. Barnard*, 108 U.S. 436, 447-448 (1883).

The Supreme Court recently held that States also enjoy sovereign immunity in administrative proceedings that sufficiently resemble civil litigation in federal courts. In *Federal Mar. Comm. v. South Carolina Ports Auth.*, 535 U.S. 743 (2002), a private entity (South Carolina Maritime Services, Inc.) filed a complaint with a federal administrative agency (the Federal Maritime Commission) contending that a state agency (South Carolina State Ports Authority) had violated a federal statute (the Shipping Act, 46 App. U.S.C.A. § 1701 et seq.). The Court held that state sovereign immunity bars a federal administrative agency from adjudicating a private party's complaint against a non-consenting state. *Id.* at 760.

The adjudicative facts here mirror those in *South Carolina Ports.* The record demonstrates, and the parties do not dispute, that the Department of Waste Management is an arm of the Commonwealth of Virginia, a sovereign state, and that Ewald is a private

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[8] By its terms the Eleventh Amendment applies only where citizens of another state or foreign citizens bring federal suits against a state. However, the United States Supreme Court has repeatedly held that the sovereign immunity enjoyed by the states extends beyond the literal text of the Eleventh Amendment. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) (sovereign immunity shields states from private suits in state courts pursuant to federal causes of action); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991) (applying state sovereign immunity to Indian tribes); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (applying state sovereign immunity to suits by foreign nations); *Hans v. Louisiana*, 134 U.S. 1 (1890) (applying state sovereign immunity to suits by a state's own citizens under federal-question jurisdiction).

party, who seeks to adjudicate her federal whistleblower complaint before a federal adjudicative agency, the United States Department of Labor (DOL). Furthermore, Virginia has clearly indicated its non-consent to be sued. *See Cannamela v. State of Georgia*, 2002-SWD-2, slip op. at 2 (ALJ July 26, 2002) (finding that by filing a motion to dismiss, Georgia indicated that it did not consent to be sued in the Department of Labor). Thus, the relevant facts here are foursquare with those in *South Carolina Ports*. Accordingly, we hold that as a matter of law, state sovereign immunity bars Ewald's complaint against Virginia unless Ewald demonstrates that Congress authorized CERCLA, RCRA, CWA, and SDWA whistleblower complaints against the states or that Virginia waived its immunity.

II. Ewald has failed to establish that Congress abrogated state immunity from whistleblower complaints. Nor has she demonstrated that Virginia waived its immunity from prosecution under the whistleblower statutes.

A. Congress did not abrogate state sovereign immunity with respect to the whistleblower protection provisions of the statutes at issue.

Congress may abrogate state sovereign immunity if it acts pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment and makes its intention to abrogate unmistakably clear in the language of the statute. *Alden*, 527 U.S. at 756; *Fitzpatrick*, 427 U.S. at 456.

The employee protection provisions of the environmental statutes at issue–CERCLA, RCRA, CWA, and SDWA–do not clearly indicate that Congress expressed any intention to abrogate state sovereign immunity from whistleblower complaints. However, Section 9610(a) of CERCLA provides in part that no "person" shall fire or in any other way discriminate against any employee because he or she has provided information to a state or the federal government, or has filed, instituted or testified in any proceeding resulting from the administration or enforcement of the act. 42 U.S.C.A. § 9610(a). "Person" is defined as the federal government, state, municipality, commission, political subdivision of a state, or any interstate body. 42 U.S.C.A. § 9601(21).

Ewald argues that by including "state" within the definition of "person," Congress abrogated sovereign immunity and thus permitted CERCLA whistleblowers to proceed against states. Complainant's Response to Order to Show Case at 10.[9] We reject this argument.

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[9] Though Ewald argues only with respect to CERCLA, the CWA and the RCRA (now known as the Solid Waste Disposal Act (SWDA)) also prohibit any "person" from engaging in the prohibited activities. *See* 33 U.S.C.A § 1367(a)(West 2001); 42 U.S.C.A. § 6971(a)(West 2003). "Person" is defined in both acts to include a state. 33 U.S.C.A. § 1362(5); 42 U.S.C.A. § 6903(15). SDWA prohibits an "employer" from discharging or

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"Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Mounting authority holds that Congress did not abrogate the states' immunity from whistleblower claims. *See Connecticut Dep't of Envtl. Prot. v. OSHA*, 138 F. Supp. 2d 285, 296-97 (D. Conn. 2001) (filing, inter alia, CWA and SWDA [formerly RCRA] claim with OSHA by private party against a state agency violated that state's sovereign immunity); *Florida v. United States*, 133 F. Supp. 2d 1280, 1291 (N.D. Fla. 2001) (administrative hearing involving CWA, RCRA, and CERCLA, among others, violated state's sovereign immunity); *Ohio Envtl. Prot. Agency v. United States Dep't of Labor*, 121 F. Supp. 2d 1155, 1162 (S.D. Ohio 2000) (CERCLA, SDWA, RCRA, and CWA whistleblower complaint proceedings before ALJ and ARB violated states' sovereign immunity).

We have recently relied upon this authority and, because it is directly on point and persuasive, we do so here. *See Cannamela v. State of Georgia Dept. of Natural Res.*, ARB No. 02-106, ALJ No. 2002-SWD-2, slip op. at 4 (ARB Sept. 30, 2003). Thus, since Ewald did not produce evidence to the contrary, we hold that Congress did not abrogate the states' immunity from CERCLA, RCRA, CWA, and SDWA whistleblower complaints

B. Virginia's participation in the Superfund program did not constitute waiver of its sovereign immunity.

Ewald contends that Congress conditioned disbursement of CERCLA Superfund monies upon the states' consent to be sued for whistleblower discrimination in the Department of Labor Complainant's Response to Order to Show Cause at 10. Ewald analogizes her case to the situation in *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999). There, Litman, a student at George Mason University (GMU), filed suit in federal court alleging sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681 et. seq. GMU received United States Department of Education funding under Title IX. Litman asserted that her suit against a state instrumentality in federal court was authorized by 42 U.S.C.A. § 2000d-7(a)(1): " A State shall not be immune under the Eleventh Amendment of the Constitution of the

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otherwise discriminating against employees who have engaged in protected activities. *See* 42 U.S.C.A. § 300j-9(i)(1)(West 2003). "Employer" is not defined, but another section of the statute's protection provisions reads, in part: "Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of [section 300j-9(i)(1)] may . . . file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination." 42 U.S.C.A. § 300j-9(i)(2)(A). The definition of "person" includes a "State." 42 U.S.C.A. § 300f(12).

United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972 . . . ."

Litman contended that GMU waived its sovereign immunity as a condition of accepting federal education funds under Title IX. *Id.* at 551. The court in *Litman* noted that a state may waive its immunity by "voluntarily participating in federal spending programs when Congress expresses a 'clear intent to condition participation in the programs . . . on a state's consent to waive its constitutional immunity.'" *Id.* at 550 (quoting *Atascadero,* 473 U.S. at 247). The court then found that section 2000d-7(a)(1) evidenced a "clear, unambiguous, and unequivocal waiver of Eleventh Amendment immunity," and that when GMU accepted the Title IX funds, it consented to litigate discrimination suits, like Litman's, in federal court. *Litman*, 186 F.3d at 554-555.

Ewald argues that the "same explicit understanding" that existed between GMU and the Department of Education existed between the EPA and Virginia. That is, since Virginia received Superfund grant money from EPA under authority of CERCLA, it agreed not to discriminate against whistleblowers and, furthermore, consented to its regulatory provisions, i.e., litigating whistleblower claims in the Department of Labor. Complainant's Response to Order to Show Cause at 10. We disagree.

Whether Virginia "understood," "explicitly" or otherwise, that federal funds would be provided only if it agreed to be bound by the provisions of CERCLA and its implementing regulations is not the test for determining whether it waived its immunity. *See Edelman v. Jordan,* 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."). Furthermore, the mere receipt of federal funds cannot establish that a state has waived its immunity. *Atascadero*, 473 U.S. at 246. A state will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman,* 415 U.S. at 673 (citation omitted). Unlike the court in *Litman*, we find no clear, unambiguous expression of waiver in CERCLA. Simply put, CERCLA does not unequivocally indicate that a state waives its immunity from DOL whistleblower prosecution by accepting Superfund money.

Even so, Ewald argues that her documentary evidence demonstrates that Virginia waived its sovereign immunity. But here, too, she fails to convince us. We have carefully reviewed Ewald's January 11, 2001 affidavit and the documents she submitted in support of her opposition to Virginia's motion to dismiss.[10] We have construed this

[10] The documents are an October 12, 1988 application and budget breakdown for federal assistance seeking $263,158 in estimated federal funding under the Core Program Cooperative Agreement "to carry out CERCLA implementation beyond specific site work."

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evidence in the light most favorable to Ewald, as we must in deciding a motion for summary decision. *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 1999-TSC-4, slip op. at 4 (ARB Feb. 10, 2003). But none of Ewald's purported evidence of waiver so much as alludes to sovereign immunity. We find it does not constitute proof of waiver.

Inasmuch as Congress has not clearly indicated an intent to condition the states' receipt of CERCLA funds on their waiver of sovereign immunity from whistleblower prosecutions, and because Ewald has not otherwise demonstrated a waiver, we conclude that there is no genuine issue as to any material fact as to whether Virginia waived immunity. Therefore, Virginia did not waive its sovereign immunity by its participation in the Superfund program.

C. Ewald's additional arguments regarding Virginia's waiver of sovereign immunity have no merit.

Ewald urges us to reject Virginia's "reliance on an eleventh hour, 11th Amendment escape from liability" that it asserted only "when the merits of its

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Exhibit 1, Complainant's Supplemental Brief. Exhibit 2 consists of more budget information, sorted into categories and indicating $839,671 in program income.

Exhibit 3 is a list of 18 assurances that the applicant, Virginia's Department of Waste Management, will comply with various federal laws concerning discrimination, personnel, the environment, employment, and other areas. Exhibit 4 is a list of 12 similar assurances. As the ALJ noted, R. D. & O at 12, the grant documents, Exhibits 3 and 4, are similar to the assurances under the SWDA discussed in *Rhode Island v. United States Dept. of Labor*, 115 F. Supp. 2d 269 (D.R.I. 2000). In that case, as here, the state agreed to abide by federal laws prohibiting various forms of discrimination as a condition to receiving federal program funds. The court in *Rhode Island* observed that the provision embodying this agreement in various application and program documents "falls far short of the express and unequivocal language required to establish a waiver. On its face, it is simply an agreement to abide by federal laws prohibiting discrimination. It does not even mention, let alone waive, a state's immunity from suit by private parties." *Id.* at 277.

Exhibit 5 is a November 6, 1987 letter from Virginia Governor Gerald L. Baliles to the EPA regional administrator, advising him that the Department of Waste Management is "the lead agency authorized to enter into cooperative agreements and contracts" under section 104(c)(3) of CERCLA. Exhibit 6 provides details of the grant application under the Superfund Amendments and Reauthorization Act of 1986 (SARS), including the required activities necessary to implement the program. Exhibit 7 is a December 10, 1988 memorandum advising Bailey to sign the copies of the Superfund agreement covering December 15, 1988, to December 14, 1989, as soon as possible so that funds can be released for Virginia's use.

arguments" failed. She appears to argue that Virginia's resort to the sovereign immunity "shield" is time barred ("[A]cceptance of the Commonwealth's very late assertion of immunity could significantly limit or even eliminate [Ewald's] chance for recovery."). She also contends that since Virginia "voluntarily submitted" to DOL jurisdiction by defending against the merits of her discrimination complaint, it has thus waived its immunity. Complainant's Response to Order to Show Cause at 8-9. These arguments are unavailing.

First, sovereign immunity is not an affirmative defense that a party must raise within a certain time frame or else it is waived. Rather, it is total immunity from the suit itself. It is "a fundamental constitutional protection." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993). Sovereign immunity does not merely constitute a defense to all types of liability but rather provides immunity from suit. *South Carolina Ports*, 535 U.S. at 766.

Nor does passage of time bar a state from relying on the protection of sovereign immunity. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883) (state sovereign immunity is "a personal privilege, which it may waive at [its] pleasure"). Thus, a state may assert its immunity at any time during the proceedings, including on appeal. *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974).

Second, a waiver of state sovereign immunity cannot be implied simply because Virginia has participated in this administrative litigation. Ewald suggests that Virginia was not coerced into participating in the DOL proceedings and therefore it waived immunity. We disagree. When confronted with Ewald's discrimination complaint, Virginia was required to defend in the DOL.[11] Indeed, a state "seeking to contest the merits of a complaint filed against it by a private party must defend itself [in an administrative forum] . . . or substantially compromise its ability to defend itself at all." *South Carolina Ports*, 535 U.S. at 762. *See also Rhode Island Dept. of Envtl. Mgmt. v. United States*, 304 F.3d 31, 48-49 (1st Cir. 2002) (rejecting argument that a state waives sovereign immunity by filing an answer and conducting discovery). One federal district court nicely summarized by noting that states sued by a private party in an administrative action face "the Hobson's choice of responding to the complaint, in violation of . . . its fundamental right of immunity from suit, or of not responding and facing a default judgment and an enforcement action." *Connecticut Dept. of Envtl. Prot. v. Occupational*

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[11] *See* 29 C.F.R. § 18.5(a) ("Within thirty (30) days after the service of a complaint, each respondent *shall* file an answer.") (emphasis supplied); 29 C.F.R. § 18.5(b) ("Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations . . . and to authorize the administrative law judge to find the facts as alleged in the complaint and to enter an initial or final decision containing such findings . . . .").

Safety and Health Admin., 138 F. Supp. 2d 285, 296 (D. Conn. 2001). Thus, for the reasons given, we reject these two arguments.[12]

III. The ALJ acted within his discretion in denying Ewald's motion to add Das, Bailey, and other respondents.

Ewald argued to the ALJ that if Virginia is immune from her whistleblower complaint, she should nevertheless be permitted to amend her complaint to add parties. She moved to add Das, her former supervisor, and Bailey, the former Department of Waste Management Director, as respondents in their individual capacities. Ewald asserted that these individuals had been the "primary perpetrators" of the discrimination. Later, Ewald moved to further amend her complaint to add the federal EPA. Finally, she sought to add the current head of Virginia's Department of Waste Management in "his/her individual capacity" so that she might be able to have her personnel records expunged and protected. R. D. & O. at 14.

The ALJ denied her motion to amend the complaint to add these parties. Ewald now urges the Board to "grant liberal leave for Ms. Ewald to amend her complaint" to add these parties. Complainant's Response to Order to Show Cause at 12-14. We interpret her Response as arguing that the ALJ erred in denying her motion to amend.

The ALJ correctly determined that 29 C.F.R. § 18.5(e) applied. That rule reads in pertinent part:

> If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or

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[12] Ewald also asked the ARB to "determine" that the Assistant Secretary of OSHA "could intervene on her behalf" against Virginia to "ensure that wrongdoing does not go unpunished." Complainant's Response to Order to Show Cause at 15-16. Section 24.6(f)(1) reads in part: "At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or participate as *amicus curiae* at any time in the proceedings." 29 C.F.R. § 24.6(f)(1). Though the Assistant Secretary did participate as amicus, he stated on October 31, 2002, that he had no position on Ewald's waiver and amended complaint arguments. *See* n.7. Furthermore, the Assistant Secretary has not filed a motion to intervene. Therefore, we will not determine whether the Assistant Secretary "could" intervene here. *Cf. Migliore v. Rhode Island Dept. of Envtl. Mgmt.*, ARB No. 99-118, ALJ Nos. 98-SDW-3, 99-SDW-1, 99-SDW-2, slip op. at 4 (ARB July 11, 2003) (the ARB declines to issue an advisory opinion on the Assistant Secretary's authority to intervene).

> other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint.

Ewald argues that *Wilson v. Bolin Associates, Inc.*, 1991-STA-4, (Sec'y Dec. 30, 1991), which interprets rule 18.5(e), is authority for her contention that individuals or other entities that retaliate against whistleblowers may be added as respondents. Bolin, the sole shareholder and chief executive of the defunct corporate respondent, made the decision to discharge Wilson. The Secretary affirmed the ALJ's ruling that Wilson be permitted to add Bolin, individually, as a party respondent. The Secretary found that since Wilson's original complaint specifically challenged Bolin's decision to discharge him, adding Bolin as a respondent was reasonably within the scope of the original complaint. *Id.* slip op. at 3. However, the Secretary was also careful to note that the record demonstrated that "Bolin received notice from the outset of this case and participated in the investigation and all proceedings." Therefore, she concluded, allowing Wilson to amend the complaint to add Bolin as a respondent was consistent with due process considerations.[13]

Here, the ALJ points out, Das and Bailey, unlike Bolin, have not participated in a very long time. Though Ewald deposed them in 1989, neither had received notice or otherwise participated in any of the proceedings since then. Likewise, the ALJ found that the federal EPA was involved, if at all, long ago. Thus, having considered the *Bolin* due process prerequisites, the ALJ concluded that an amendment adding Das, Bailey, and the EPA was not reasonably within the scope of Ewald's original complaint.[14]

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[13] The Secretary concluded that the "amendment was proper and is consistent with cases arising under the Fed. R. Civ. P. 15, to the extent that that rule is applicable pursuant to 29 C.F.R. § 18.1(a). *See e.g., Barkins v. International Inns, Inc.*, 825 F.2d 905, 907 (5th Cir. 1987); *Itell Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1258 (11th Cir. 1983); *Serrano v. Collazo Torres*, 650 F. Supp. 722, 725-29 (D.P.R. 1986)." *Wilson*, slip op. at 3-4.

[14] The ALJ disposed of Ewald's request to add the current head of Virginia's Department of Waste Management on different grounds. Ewald sought to add this person so that if she prevailed on her complaint, she could request that the ALJ order the person to expunge her employment records or prohibit their release. The ALJ noted, however, that this person would have to engage in "official" action to accomplish what Ewald sought. Ewald moved to add this person "in his/her individual capacity." But the ALJ found it unlikely that this person, in his or her individual capacity, would have access to Ewald's records or authority to take action regarding them. The ALJ also noted that "mere succession to an office in public service does not expose a blameless official to individual liability exposure for the actions of his of her predecessors." Therefore, the ALJ concluded that this person

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We review allegations of procedural errors under the abuse of discretion standard. *Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 5 (ARB Mar. 30, 2001). *See generally Khandelwal v. Southern California Edison*, ARB No., 98-159, ALJ No. 97-ERA-6 (ARB Nov. 30, 2000)*; Malpass v. General Elec. Co.*, Case Nos. 85-ERA-38, -39, slip op. at 5-6 (Sec'y Mar. 1, 1994) (discussing ALJ's authority to conduct trial hearings under the Administrative Procedure Act). The ALJ correctly determined that the section 18.5(e) amendment rule was applicable. Furthermore, his reading of *Bolin*, which interprets the amendment rule, was reasonable. He correctly took into account the due process considerations mandated by *Bolin.* This record clearly supports the ALJ's findings that participation by Das, Bailey, and the EPA in these proceedings was so remote that an amendment adding them as respondents would not be reasonably within the scope of the original complaint. We therefore conclude that the ALJ acted within his discretion in denying Ewald's motion to amend her complaint.

CONCLUSION AND ORDER

State sovereign immunity bars Ewald's complaint because she has failed to produce any evidence or provide authority that Congress abrogated the states' immunity from CERCLA, RCRA, CWA, and SDWA whistleblower prosecution or that Virginia waived that immunity. Therefore, we find no genuine issue of material fact exists to support Ewald's complaint. Thus, Virginia is entitled to summary decision. In addition, we find and conclude that the ALJ properly exercised his discretion in denying Ewald's motion to amend her complaint. Consequently, we **DISMISS** Ewald's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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could not be added as a respondent. R. D. & O. at 16. We find this reasoning to be sound and conclude that the ALJ acted within his discretion. We therefore affirm the ALJ's decision to deny this amendment to the complaint.